Supreme Court, U.S.
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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

ALONZO GRAVES, JR.,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a defendant can be convicted of mail fraud in violation of 18 U.S.C. §1341 absent either direct evidence of any intent to defraud, suspicious circumstances which would alert the individual to his involvement in a fraudulent scheme or any evidence which would tend to establish intent on the part of the defendant?

II. Whether the conviction of a defendant should be withheld where the government's conduct is fragrantly improper and inflammatory and results in effectively denying the defendant of his right to a fair trial?

TABLE OF AUTHORITIES

Cases	Page
Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 74 L.Ed.2d 1314 (1935)	58
Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986)	53, 54
Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979)	52
Dubose v. Lefevre, 619 F.2d 973 (2nd Cir. 1980)	53
Haber v. Wainwright, 756 F.2d 1520 (Cir. 1985)	52
Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991), cert. den. _ U.S. _, 112 S.Ct. 957, 117 L.Ed.2d 124 (1992)	42
United States v. Bagley, 473 U.S. 667, 106 S.Ct. 3375, 87 L.Ed.2d 481 (1985)	53
United States v. Bailey, 859 F.2d 1265 (7th Cir. 1988); cert. den. 488 U.S. 1010, 109 S.Ct. 796 102, L.Ed.2d 787 (1989)	37, 39, 40
United States v. Farris, 614 F.2d 634 (9th Cir. 1980), cert. den. 447 U.S. 926, 100 S.Ct. 2022, 65 L.Ed.2d 1120 (1980)	28
United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986)	27
United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984)	28

United States v. Kreimer, 609 F.2d 126 (5th Cir. 1980) 27, 30

United States v. Martin-Trigona, 684 F.2d 485 (7th Cir. 1982) 27

United States v. McClain, 823 F.2d 1457 (11th Cir. 1987) 57

United States v. Monaghan, 741 F.2d 1434 (D.C. Cir. 1984), cert. den. 420 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985) 44

United States v. Parker, 839 F.2d 1473 (11th Cir. 1988) 29, 30, 31, 37

United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) 61

United States v. Piepgrass, 425 F.2d 194 (9th Cir. 1970) 39

United States v. Ramsey, 785 F.2d 184 (7th Cir. 1986), cert. den. 476 U.S. 1186, 106 S.Ct. 2924, 91 L.Ed.2d 552 (1986) 39

United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985) 61, 62

United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977) 53

United States v. Wilson , 904 F.2d 656 (11th Cir. 1990), cert. den. __ U.S. __, 112 S.Ct. 250, 116 L.Ed.2d 205 (1991) 52

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) 58, 60, 62

Statutes	Page
18 U.S.C. §1341	1, 2, 4, 27, 29

REFERENCE TO OPINIONS DELIVERED BY OTHER COURTS

Petitioner was found guilty of mail fraud in violation of 18 U.S.C. §1341 by the United States District Court for the Southern District of Georgia on April 1, 1992, and was sentenced on July 30, 1992. His appeal to the United States Court of Appeals for the Eleventh Circuit was denied on February 10, 1994, without opinion. A subsequent Petition for Rehearing and Suggestion of Rehearing En Banc was also denied by the Court without opinion.

STATEMENT OF GROUNDS FOR JURISDICTION

The conviction and sentence of the United States District Court for the Southern District of Georgia for violation 18 U.S.C. §1341 was appealed to the United States Court of Appeal for the Eleventh Circuit. The conviction and sentence were affirmed per curiam without opinion on February 10, 1994. A subsequent Petition for Rehearing and Suggestion for Rehearing En Banc were denied without opinion on May 2, 1994. This Court has jurisdiction to hear the Petitioner's Petition for Writ of Certiorari pursuant to 12 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment VI (1791) - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. §1341 - Frauds and Swindles - Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized

depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. (As amended Aug. 9, 1989, P. L. 101-73, Title IX, Subtitle F, §961(i), 103 Stat. 500; Nov. 29, 1990, P. L. 101-647, Title XXV, Subtitle A, §250(h), 104 Stat. 4861.)

STATEMENT OF THE CASE AND THE FACTS

The Petitioner was charged in the United States District Court for the Southern District of Georgia in indictment number: 51-0009, returned on June 7, 1991, with mail fraud in violation of 18 U.S.C. §1341 along with numerous other individuals. Petitioner was tried along with one of the other indicted individuals, Jerry L. Orange. Trial commenced on March 31, 1992, and verdicts of guilty were returned on April 1, 1992, as to all counts in which he was named in the indictment.

Subsequently, Petitioner filed his Motion for Judgment of Acquittal and Motion for New Trial, which were denied by order of the District Court on June 1, 1992. On July 30, 1992, sentence was imposed. The verdicts and sentence were appealed to the United States Court of Appeal for the Eleventh Circuit which affirmed them without opinion on February 10, 1994. That court also denied Petitioner's timely Request for Rehearing and Suggestion for Rehearing En Banc. That court did, however,

enter a stay of its mandate so that this Petition could be heard by this Court.

From approximately April of 1986 until October of 1990, Dr. John Randall Dixon, Jr., and Lela Dixon owned and operated a chiropractic clinic in Waycross, Georgia (hereinafter referred to as the "Dixon Clinic"). The Clinic, which operated out of a refurbished home, provided chiropractic treatment and services which were performed by Dr. Dixon. Petitioner and his family were, in fact, patients of Dr. Dixon and received chiropractic treatments at the Dixon Clinic. In addition to providing these services (and unbeknownst to Petitioner), the Clinic was also used by the Dixons to perpetrate their scheme to defraud insurance companies.

Petitioner was completely unaware that the Dixons had concocted a fraudulent scheme that began when individuals would come in for chiropractic services and complete and sign an assignment of benefits form and a claim form to be sent to their insurance companies on their initial visit. Subsequently, regardless of whether the patient returned for treatment, insurance

companies were billed for treatments as if a patient received treatment three times a week. Patients were not required to execute additional claim forms for additional treatments billed or to complete any paperwork or the like in relation to the treatment. Insurance proceeds were paid directly to the clinic. Patients were also never asked to make any co-payments which may have been required under their insurance. In order to increase the volume of patients, those patients who referred new individuals to the clinic were paid a $100 referral fee for each referral. Additionally, patients were paid "advertising fees" which the Government maintained but never proved were based upon the amount of payment received from the insurance companies regardless of the treatments received by the patient. Eventually, the clinic's records demonstrated that it was submitting bills on a regular basis for trice-weekly treatments which were allegedly being provided to in excess of 400 patients.

It was well established at trial that not all of the patients of the Clinic were patients on paper only. Some of the patients, including Petitioner, actually had medical problems for which they

received necessary chiropractic treatment. Both patients actually receiving treatment, as well as those whose names appeared on the books for billing purposes only received the referral and advertising fees. Those patients who inquired as to the legality of receiving referral and/or advertising fees were told that the payments were perfectly legitimate in that they constituted payments for word-of-mouth advertising which was the Clinic's only way of advertising its services. Long term employees testified that they, too, were unaware of any illegality involved in this practice for some time into their employment, and only suspected wrong doing after they were asked to falsify patient records and progress notes which, of course, a legitimate patient would have no knowledge of.

The clinic submitted its claims to the patients' insurance companies by use of the United States Postal Service. Once the initial claims form was signed by the patient on his or her first visit, the insurance companies no longer required that a claim form to be signed by the patient to obtain payment from the insurance company for subsequent services. Payments were also

received by the clinic from these companies through the United States Postal Service. The normal practice was for the insurance company to mail to the individual insured an explanation of benefits form (hereinafter referred as "EOB"), which was intended to demonstrate to the insured the claim submitted by and amounts paid to any medical care providers. The EOB form did not delineate individual visits or treatments received from the health care provider. It simply provided beginning and ending dates for the period of time covered by the particular EOB and the total amount of benefits claimed and paid for that period and to whom.[1] Additionally, at least one insurance company sent out letters of verification with regard to the services provided when a particular provider appeared to be providing excessive or overbilled services. These letters were sent to a random sampling of patients, and not all patients received them. Though the Government relied heavily on the existence of these verification

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[1]The EOB's were not as clear as the Government would have liked the jury to believe. In fact, the one witness put on by the Government to demonstrate that his review of the EOB he received led him to curtail his visits to the clinic stated that it was because the clinic's charges were "inflated and certainly not correct" not because the clinic billed for treatments never given.

letters, it is undisputed that such a letter was either sent to or received by the Petitioner.

In 1988, Petitioner, a resident of Plant City, Florida, had been transferred by his employer, CSX Railroad, Inc., and was working in Waycross, Georgia. Petitioner had a history of neck and back pain and had previously benefitted from treatment by a chiropractor. His problems were exacerbated by continual trips home by car to Plant City from Waycross. When he told a co-worker of his discomfort, he was referred to the Dixon Clinic.

Petitioner was told by his co-worker that Dr. Dixon paid $100, described as a "finder's fee", for referring new patients to the clinic. Although the Government, throughout the trial, repeatedly asserted that patients were paid one-third of all insurance proceeds received by the clinic, the Government's own witness stated that the documents which the Government had seized failed to establish that <u>any</u> patient received payments equivalent to one-third amount of the insured funds received. In addition, Petitioner testified that he was never told that he would receive a fraction or percentage of insurance payments received.

His only expectation was of a $100 referral fee for patients referred to the clinic. He fully admitted that he referred approximately 30 patients, including his own wife, over the 19 months that he received treatment from Dr. Dixon. Petitioner never asked for or expected payment, but was simply told occasionally when he arrived at the office for his regular treatment that a check was available for him. These checks were designated only as "advertising fees". Unrebutted evidence was that Petitioner made bi-weekly office visits for treatment on average and, in fact, received treatment upon each visit.

In an attempt to establish an intent on the part of Petitioner, the Government tried to show that the practices and procedures at the Dixon Clinic were unorthodox, unprofessional and suspect, through the observations of various individuals (but not Petitioner) who were acquainted with the operations of the clinic in varying degrees. It was established for example that the clinic employed no other medical technicians other than Dr. Dixon. The other clinic employees were billing clerks, some of whom also doubled as x-ray technicians. Much was made of the

fact that these individuals lacked training in this area; that the individuals took x-rays of clothed patients without sufficient protections from the x-ray for either the employee or the patient; and that the design of the clinic necessitated having the x-ray technician stand in a former shower stall while actually taking the x-ray. No evidence was offered, however, which tended to establish that Petitioner knew about that the lack of training or that the x-ray methods were unorthodox. Undisputed was that actual x-rays for actual use in treatment were, in fact, taken.

There was further evidence at trial that Dr. Dixon kept a dog, not only at the clinic, but, on occasion, in the treatment room with patients; that he carried a gun; that he prayed in front of patients; kept limited office hours and provided treatments of short duration in front of other patients of the clinic. There was no proof by the Government that Petitioner at any time saw a dog at the clinic or during treatments or that he knew that Dr. Dixon carried a gun. No evidence was presented establishing or tending to establish that Petitioner knew the number of technicians at the clinic was inadequate or that they lacked proper training, or that

procedures were inappropriate. The Government, in fact, failed in any way to establish how many technicians were necessary for the operation of a chiropractic clinic or the training necessary for technicians to be considered qualified.

Significantly, the Government offered no evidence to establish that Dr. Dixon was not qualified to conduct chiropractic treatments or that any of the practices described above interfered with his ability to practice as a chiropractor. There was no evidence adduced that Dr. Dixon lacked necessary medical qualifications to provide the treatments billed for, that the clinic was unlicensed or not properly equipped to function as a chiropractic clinic, or that the length of treatment to a given patient was inconsistent with any acceptable standard of chiropractic. In fact, the doctor and the clinic were duly licensed and authorized to provide the chiropractic treatments that were received by the Petitioner.

The Government also relied on the practice of Petitioner's health insurance provider, Travelers' Insurance Company, in mailing to its individual insureds an EOB form outlining the

claims made by and paid to health care providers on behalf of the insured. It was argued that the EOB forms should have placed Petitioner on notice that the insurance company was paying for services not actually provided to Petitioner or his wife such that the jury could infer a specific intent on the part of Petitioner to participate in the fraudulent scheme. The Government failed to establish, however, that Petitioner ever actually received the EOBs, which were mailed to the couples' Plant City home; that he read or comprehended the EOB form; that he understood or appreciated the import of the information relayed by the form; or that the forms established that claims were paid for services rendered which were never actually received by Petitioner.

The undisputed evidence established that much of the mail received at Petitioner's Plant City home (primarily occupied by Petitioner's wife) was left unopened by Petitioner's wife, who was suffering from severe depression as a result of the death of her son. Petitioner's adult daughters, who cleaned the Plant City home for Petitioner and his wife, frequently threw away mail unopened. Additionally, when Petitioner's wife did open an EOB

form and found that it was in error, she and Petitioner immediately confronted the clinic with the discrepancies and were told that it was a clerical error that would be "taken care of". It is further undisputed that once Petitioner became aware of the scheme taking place at the clinic, he sought and received the services of another chiropractor.

Knowing it lacked either direct or indirect evidence of intent or knowledge on the part of Petitioner, the Government conducted a prosecution based on unsubstantiated generalizations, misstatements of the evidence presented and out and out deception. Despite a complete lack of evidence that Petitioner either knew of the existence of EOBs or read or understood the significance of the form for example, the expansively stated:

> The patients knew that for every check they got from Dixon there was an EOB mailed...and everybody knew that that was what was going to happen. Patients knew that as long as this process continued there would be mailing after mailing, after mailing, after mailing, after mailing to carry out this scheme...The Defendants here knew that these mailings would take place. They received EOBs through the mail. (emphasis added).

With regard to the verification letters sent out by the Petitioner's insurance company which the insurance company's own representative admitted had not been sent to Petitioner or his wife, the Government stated, "They sent it back through the mail".

Despite having offered no evidence with regard to Dr. Dixon's medical qualifications or lack thereof, or what did or did not constitute an acceptable and reasonable chiropractic treatment, the Government stated:

> They were going there for the money, not for the treatment, if they got any. And certainly two or three minutes they may have spent in there would not constitute a treatment in any reasonable sense of the word, if Dixon had known what was wrong with them to start me (sic), which he patently did not. (emphasis added)

At one point, the Government actually invented testimony that never occurred and then commented on its significance:

> And recall the testimony of Al Graves coming down to the office with some dates to be billed on and then having to check the books and see that, oops, its been a month and he hasn't been billed.
>
> If you look at the checks you can see the gap. Checks came in about two week intervals in the case of Al Graves, except one. There is a big gap of about six weeks and in that check, a $400.00 one, is the biggest one of the group we have.

> That's corroboration, ladies and gentlemen, of the fact that the witness said he came down and said, 'Hey, update my file, I haven't been billed for a while.' Now is he worried about medical treatment?

This testimony simply never took place. Nowhere in the record did any witness testify that Petitioner went to the chiropractic clinic for purposes of having particular dates billed that he had not received treatment. Not only is this purported testimony a complete fabrication, it allowed the Government to urge the jury to draw a conclusion with regard to the intent of Petitioner that had no basis in the evidence. As further misstatement, the prosecutor argued:

> How in the world can he [Graves] deny knowledge when he is picking up advertising money for a wife he knows is in Tampa, Florida and has come to Dixon a very few times when she happens to be in town at his insistence? How can be possibly in the face of that, deny knowledge?

There was no evidence whatsoever to support the claim that Petitioner insisted that his wife come to Waycross in order to engage "in a few" visits to Dr. Dixon. The undisputed testimony by Kathryn Graves was that she regularly received treatment from

Dr. Dixon when she was in town visiting her husband, which was frequently.

A critical misrepresentation also occurred with regard to the plea agreement entered into between the Government and their chief witness, Janell Hornsby. This witness provided the most comprehensive testimony in terms of the operations and day to day practices of the Dixon Clinic. She also was the only witness who claimed that Petitioner never received treatments at the Dixon Clinic. On cross-examination, she denied having entered into a plea agreement with the Government. This testimony was buttressed by the Government on redirect when the Government attempted to confirm her assertion that there was no plea agreement. It was not until long after this Government witness was dismissed and at the conclusion of the Defendant's case that the Government conveyed to Petitioner's trial counsel that a plea agreement had, in fact, taken place. Though the existence of the plea agreement was relayed to the jury by way of stipulation, any curative effect of the stipulation was negated when the prosecutor stated, in rebuttal argument to the jury, that each of the clerks who

testified at trial testified "without a deal".

In a community which is heavily dependent upon the railroad for employment, which railroad paid for the insurance which was the object of Dr. Dixon's scheme and for which railroad Petitioner worked, the Government suggested that Petitioner's conduct deprived the community of jobs. In closing argument, the jury was asked, "How many people in the Waycross area stand in line for the railroad jobs?" In addition, at a time when the health care crisis is a prominent and urgent national concern, the Government suggested that Petitioner, by his alleged conduct, was intentionally driving up health insurance rates and victimizing the jury by depriving the community of affordable health insurance:

> And, ladies and gentlemen, the insurance company, in case there is any doubt in your mind, is not the victim in this case. Oh, they had to pay the money, but you know what happens next year. When an insurance company pays that money, the rates go up. The victim is not the insurance company. They're going to get their money back. And they're going to get it back from all the honest people who really need health insurance in this country and can't get it because they can't afford it even though both husband and wife are working. Those are the victims. (emphasis

added).

> And the people here who are doing everything they can to drive those rates up while lining their own pockets are responsible for it. (emphasis added).

There was no proof whatsoever that Petitioner's conduct drove up insurance rates or that he intended to drive up such rates or that any person was unable to secure health insurance because of Petitioner's conduct.

The Government further asserted that Petitioner was intentionally causing innocent people in need of medical services to be deprived of treatment:

> And there is a human cost here. Imagine, if you will, the treatment denied and the treatment delayed that resulted from this whole scam. Somebody says, "I've got a problem, I need a chiropractor" and Al Graves and Jerry Orange are standing there ready to send that person where? To John R. Dixon. Treatment denied and treatment delayed. Why? Because they get a hundred dollars if they do it. For a hundred dollars they sell out a friend.

There was no evidence whatsoever that Dr. Dixon was not a licensed chiropractor and that he in any way committed malpractice, denied any patient proper and necessary medical care

when needed, or that Petitioner caused such conduct or intended to or did "sell out a friend."

The prosecutor called Petitioner, whose only crime was seeking and receiving chiropractic treatment, and his co-Defendant "thieves and conmen" who engaged in "lying, cheating and stealing"; and equated Petitioner's conduct in seeking medical treatment with patronizing a "chop-shop" and deliberately ordering stolen cars. In conjunction with the appeal to the jury's work ethic, supposed deprivation of job opportunity, affordable health insurance and medical care, the prosecutor even went so far as to claim a personal patriotism suggesting that Petitioner was un-American:

> "Ladies and Gentlemen, it's not my America that he's talking about. Something for nothing has never, so far as I'm concerned, been the American way and so far as I'm concerned, never will be." (emphasis added)

In short, the prosecutor's remarks to the jury were pervasively inflammatory and, particularly with the glaring paucity of evidence against Petitioner, were plainly prejudicial.

Misstatements of the law also occurred in the Government's argument. In attempting to explain the elements of fraud to the jury, the Government stated:

> There are no legal technicalities in recognizing an attempt to defraud. Fundamental fairness, moral uprightness, honesty and fair play. These are the measures of honesty versus fraud, and its not technical.

This statement was correct in the limited sense that it purports to assert partial jury instructions with respect to "fundamental fairness, moral uprightness, honesty and fair play". It was misleading in that it glossed over and dismissed as a non-existent or irrelevant "legal technicality" the requisite intent, the existence and specificity of which was crucial to a valid conviction. Further confusing the true legal standards to be met, the Government stated:

> So this is not a false claims case. The object is not to prove which of these claims is or is not false.

These comments begged entirely the question for the jury of whether Petitioner knew Dr. Dixon had filed false claims concerning his own treatment. The fact remains that the Government failed to establish that any of the claims submitted on

behalf of Petitioner or his wife were for non-existent visits. Additionally, the legitimacy of the claims certainly establishes his good faith in his dealings with the Dixon Clinic. If none of the submitted claims were fraudulent, no crime occurred with respect to payments on the part of the Petitioner. Thus, both the legitimacy of the claims and Petitioner's knowledge thereof were crucial considerations for the jury and the Government misstated this while it could not and did not establish that fraudulent claims were submitted for Petitioner personally.

The trial court also engaged in certain unfortunate conduct which added to Petitioner's inability to receive a fair trial and could only have exacerbated the effect of the prosecutor's misconduct on the jury. At one point, the trial court instructed a juror to stand during the Government's case in chief apparently because the court was concerned that that particular juror was falling asleep. Shortly thereafter the court cautioned the juror to "pay attention". Later, the court expressed impatience with and dismissed sua sponte a defense witness who was emotionally upset on the stand, admonishing the jury to disregard any of that

witnesses' testimony. Despite the fact that the witness later returned to testify and the court attempted a curative instruction, the overall impression was one that the jury need not grant any credence to what that witness testified to. Also, while Petitioner's trial counsel was examining Petitioner's wife on the stand, the court, despite the lack of objection by the Government, stated, "Now, that (sic) the most leading question I have ever heard". The Court proceeded to "correct" trial counsel in full view and hearing of the jury. On the other hand, the court knowingly permitted Janell Hornsby to testify that she had no plea agreement with the Government (and allowed the Government to bolster that testimony on redirect) despite the fact that the Court had actually imposed sentence on Janell Hornsby and was presumably well aware of the agreement.

Finally, the court refused to deliver an instruction to the jury which was specifically requested by Petitioner which presented Petitioner's theory of defense. This request, referred to below as Request to Charge Number Thirteen, would have clarified for the jury that the mere acceptance of payment for

referrals or advertising by a chiropractor is not illegal and cannot provide a basis for inferring that Petitioner intended to further the fraudulent aims of the scheme of the Dixon Clinic.

On the foregoing, the jury convicted Petitioner on all counts in the indictment. Following the guilty verdict, Petitioner filed a Motion for New Trial, relying in part upon the fact that Government agents had contacted witnesses who had been subpoenaed by the defense on the eve of trial. These witnesses had been intimidated by insinuations that they would find themselves facing the same type of prosecution and that they should consider consulting an attorney or invoking the Fifth Amendment. In response to these allegations, the Government responded that:

> So it was that B.K. James, Gloria Clayton, and C.K. Sires, on receipt of their subpoenas from the Defendant, contacted the agents directly themselves. They all expressed concern that testifying about their dealings with Dixon would get them prosecuted, fired, or both. They inquired whether they could "take the Fifth." They were told by the agents to seek the advice of their own counsel on the subject. The agents believed, quite correctly, that it was not their business to offer legal advice to potential witnesses nor counsel them as to anything other than their obligation to tell the truth, if called.

Additionally, the Government further suggests that the reason these witnesses were reluctant to testify was because they were reluctant to assist Petitioner in suborning perjury. The Government illustrated their version of events by describing Petitioner as being on a "slippery slope" reach out to other who were "reluctant to join him in his downward slide." This response, however, was yet another attempt by the Government to hide the true impact of what had occurred and misrepresented to the court essential facts.

The fact is that FBI Agent Bennett admitted that he had, in fact, gone to the railroad yard at CSX Railroad, Inc., to speak to Linda Hall, C.K. Sires and Francis Woodard. Though the agent was vague and forgetful about his conversations with these witnesses, it was clear that his visit was timed to apply some sort of pressure to the witnesses. Additionally, despite the Government's assertions in their response to Petitioner's Motion for New Trial, this contact was made with full knowledge of the United States Attorney's Office.

In sentencing the Defendant, the court insisted on imposing a three-level increase pursuant to Federal Sentencing

Guidelines §2F1.1 on the basis of the total amount of claims paid to the Dixon Clinic on behalf of Petitioner and his wife. Additionally, the court inflated Petitioner's role in the scheme by assessing a two-level increase for "more than minimal planning". Petitioner was subsequently sentenced to 12 months imprisonment on each count to be served concurrently; two years supervised release on each count to be served concurrently; to pay a fine in the amount of $2,000; to make restitution of $3,912.43; and to perform 100 hours of community service. This appeal to the Eleventh Circuit ensued, which resulted in the filing of this proceeding.

ARGUMENT

I. WHETHER A DEFENDANT CAN BE CONVICTED OF MAIL FRAUD IN VIOLATION OF 18 U.S.C. §1341 ABSENT EITHER DIRECT EVIDENCE OF ANY INTENT TO DEFRAUD, SUSPICIOUS CIRCUMSTANCES WHICH WOULD ALERT THE INDIVIDUAL TO HIS INVOLVEMENT IN A FRAUDULENT SCHEME OR ANY EVIDENCE WHICH WOULD TEND TO ESTABLISH INTENT ON THE PART OF THE DEFENDANT?

The essential elements of mail fraud pursuant to 18 U.S.C. §1341 are (1) a scheme to defraud, (2) involving a use of the mails and (3) for the purpose of executing the scheme. United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986). The Government must prove beyond a reasonable doubt that a particular defendant intended for a fraud to occur in order to establish the requisite intent for a conviction. Gordon; United States v. Martin-Trigona, 684 F.2d 485 (7th Cir. 1982). The Government must prove not only that there was fraudulent activity occurring, but also that the Defendant consciously and knowingly intended that the victim be defrauded. United States v. Kreimer, 609 F.2d 126 (5th Cir. 1980). Although it is well settled that intent can be inferred from circumstantial evidence, it is equally

clear that a conviction for mail fraud cannot be sustained absent sufficient proof establishing such intent.

It is not sufficient that the Government merely established what a particular defendant could have known under the circumstances. In United States v. Farris, 614 F.2d 634 (9th Cir. 1980), cert. den. 447 U.S. 926, 100 S.Ct. 2022, 65 L.Ed.2d 1120 (1980), it was held that there is no logical relationship between what a defendant could have known and a specific intent to use the mails to defraud. In Farris, a defendant who had sold securities as part of a Ponzi scheme and who had devised a sales pitch on behalf of the scheme which effectively produced sales and generated commissions for those involved could not be found guilty of mail fraud where a specific knowledge regarding the scheme could not be attributed to that defendant, but rather to his close friend and business partner. See, also; United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984) (Intent cannot be established by hindsight.).

The Eleventh Circuit's affirmance of Petitioner's conviction was in direct conflict of that court's own prior ruling

on this issue. In United States v. Parker, 839 F.2d 1473 (11th Cir. 1988), multiple defendants were convicted of mail fraud pursuant to 18 U.S.C. §1341, in a case involving a securities brokerage operation. The Eleventh Circuit issued an opinion reversing the convictions of the individuals who were directly responsible for selling the fraudulent investment instruments based on the government's failure to prove intent. In that case, the owner of a securities brokerage instructed his employees to sell investment instruments (ZCTIs) which he represented were collateralized by $10-12 million in government securities held in the company vault. The owner even telephoned an attorney to assure the salespeople that the sake of these investments were not illegal. When it was later discovered that the only collateral for the securities was less than $500,000.00 in government bonds, the owner and his four (4) top salesmen were indicted and convicted for conspiracy and mail fraud pursuant to 18 U.S.C. §1341. The government in that case contended that the conviction should be upheld based upon the overwhelming evidence of the willingness of the salespeople to profit from the false representations based

upon the fact that the four (4) salespeople on trial sold 84% all of the instruments sold by a total of ten (10) salespeople. Furthermore, the government argued that the assurances of the salespeople to customers that the instruments were "backed by the government" was further indicative of their intent to defraud investors. Citing to United States v. Kreimer, 609 F.2d 126 (5th Cir. 1980), the court said:

> Unless the appellants intended to defraud GIC customers the convictions cannot stand. ...If appellants joined Kilpatrick's scheme after its inception, they have the criminal intent necessary for conviction under the statute. ...The only evidence in the record even remotely suggesting that the salespersons intentionally joined Kilpatrick's scheme is their enormous success at selling ZCTIs.

Parker, 839 F.2d at 1479. The Court went further, finding that the salespeople involved had no duty to investigate the legitimacy of the securities involved. The Court noted that "the record is void of any seriously suspicious circumstances that would alert the average broker of potential fraud." Parker, 839 F.2d at 1479. This case illustrates the principle that individuals who are duped into unwitting participation in a scheme which is master-minded

by an individual or individuals with clear criminal culpability cannot be held criminally liable for their otherwise innocent participation.

Like Parker, the evidence against the Petitioner failed to establish any "seriously suspicious circumstances" which would have alerted Petitioner to the fraudulent scheme being conducted at the Dixon Clinic. The Government case against the Petitioner rested upon three categories of evidence more of which supported its contention that Petitioner intended to defraud his insurance company in the scheme perpetrated by the Dixons. These are: (1) facts relating to the existence of the scheme and the practice of some patients of the clinic to receive no treatment and frequent the clinic only to pick up their checks from the clinic after receiving an EOB form from their insurance company demonstrating that the clinic's claims had been paid; (2) facts relating to the staffing of the clinic by one chiropractic physician and several medically untrained billing clerks, the insufficiency of the x-ray facilities and the inadequately trained x-ray technicians, the practice of the doctor to conduct examinations while a dog or other patients were

present in the treatment room, the practice of the doctor to carry a gun and pray in front of the patients and other evidence of unorthodox activities at the chiropractic clinic; and (3) evidence regarding EOB forms which were sent to the patients from their insurance companies which outlined the claims submitted and paid by the insurance company. The evidence presented by the Government in each of these categories considered in its entirety fell far short of establishing any specific intent to defraud on the part of Petitioner.

There is no question that a fraudulent scheme was developed by the Dixons and facilitated through the operation of the chiropractic clinic. While there were undoubtedly patients who did not receive treatments and who utilized the clinic solely as a place to generate additional income by condoning the filing of fraudulent claims on their behalf, such facts do not establish that Petitioner did so. In fact, the undisputed evidence establishes that Petitioner actually received and benefitted from chiropractic treatment at the clinic. The evidence further established that Petitioner suffered from actual physical difficulties which were

treated and alleviated at the clinic. In fact, those clinic employees who had actual knowledge with regard to treatment of the patients all agreed that Petitioner was among those who actually received treatment. Additionally, Petitioner's testimony in this regard was verified not only by his wife who visited the clinic with him and received treatments in the same room, but by his 12-year-old granddaughter who recalled going to the clinic on three different occasions during a week long vacation which she spent in Waycross with her grandparents. The Government made no attempt whatsoever to rebut this evidence or directly suggest this witness was lying. On the contrary, the Government attempted to downplay this evidence by incorrectly arguing that it did not matter whether the claims submitted were true or fraudulent, as long as they were submitted in the course of the clinic's fraudulent activities. The Government tendered no evidence whatsoever that Petitioner was aware that the Doctor or the clinic was submitting false billings for other patients, with whose collective guilt the Government sought to, and did, tar Petitioner.

The next category of evidence upon which the Government relied to establish intent on the part of Petitioner is that related to the allegedly unorthodox practices within the clinic. While witnesses described a situation where untrained technicians administered x-rays from a former shower stall, the Government utterly failed to establish that Petitioner had any idea that the technicians were untrained, the conditions unsafe or that the x-rays were not used for treatment of patients. As a further example, the Government made a particular point of stressing that patients in general were not asked to remove any jewelry or clothing for the taking of the x-rays. The testimony of Petitioner established that Petitioner wore no jewelry and had no reason to believe that it was necessary for him to remove his shirt to have a proper x-ray taken or, in fact, that the removal of clothing is necessary for an x-ray to be taken. The Government pointed to evidence that Dr. Dixon was known to keep a dog at the office who was sometimes in the treatment room with the patients, was known to carry a gun and was known to pray in front of his patients. None of these factors, though somewhat eccentric, were established to be factors which

would disqualify a chiropractor from practicing his trade. Furthermore, there was no testimony that Petitioner observed such circumstances or that such behavior was so "seriously suspicious" as to put Petitioner on notice that an insurance fraud scheme was being conducted out of the clinic had he made such observations. The Government made no attempt to provide evidence whatsoever beyond the bold supposition of the prosecutor that would establish that the functioning of the clinic on a day-to-day basis were such that legitimate patients of the clinic should know that the clinic was involved in a fraudulent scam to bilk money from insurance companies. The fact that not all of the Clinic's patients, including Petitioner's own wife, were charged in relation to the Clinic's scheme tends to support a conclusion directly opposite to that of the Government's, that the functioning of the Clinic, in and of itself, was patently insufficient support an inference of intent to participate in an illegal scheme.

The last category of evidence asserted by the Government to support a finding of specific intent on the part of Petitioner was that dealing with the EOB forms provided by the insurance

companies to their individual insureds. The evidence in this regard also failed to support a finding that Petitioner had specific intent to further the clinic's scheme to defraud. To begin with, the evidence failed to establish that Petitioner had received, much less read or understood, any EOB form sent by the insurance company. The only evidence was that there were several pieces of unopened mail in Petitioner's Plant City residence which were disposed of by his daughters in an effort to assist their depressed and ill mother in housekeeping tasks. In fact, the defense and not the Government offered the only evidence establishing that any EOB form was received by either Petitioner or his wife and was read and understood. This was the EOB form that was received by Kathryn Graves and questioned by her in that she knew she could not attend appointments in Waycross when she had important work days in Florida which she could not miss. Petitioner and Kathryn brought this discrepancy to the attention of the clinic together and were told that it would be taken care of. They had no reason to believe that the notations on the form were anything other than the clerical error which the clinic represented them to be. In fact,

there is an overwhelming lack of evidence demonstrating any special knowledge or expertise on the part of Petitioner which would lead him to believe that the operations of the clinic were anything other than unusual at worst.

In United States v. Bailey, 859 F.2d 1265 (7th Cir. 1988); cert. den. 488 U.S. 1010, 109 S.Ct. 796 102, L.Ed.2d 787 (1989), the Seventh Circuit reached a conclusion similar to the Eleventh Circuit's in Parker with regard to defendants whom were only nominally involved in a mail fraud scheme in connection with a bank fraud scandal. The two defendants who were only nominally involved had been asked by one of the major conspirators to execute certain loan documents for the purchase of condominiums owned by the financial institution, while at the same time executing an agreement for the financial institution to buy back the condominiums at the option of the purchaser, and, all in the same transaction, tendering the condominiums to the bank pursuant to the buy back provision. The purpose of the execution of these documents was to create the illusion that the financial institution had more buyers for its own condominium

units then it actually did. The two defendants got in and out of the transaction on the same day and made a profit of $5,000 each. When one of the investors inquired as to the legality of the transaction, he was told that not only was the transaction legitimate, but that one of the conspirators own parents were engaging in the same transaction. From those facts, the Seventh Circuit found that the government had presented no evidence that the defendants had any expertise in banking or real property which would lead them to know that their participation in executing loan documents was furthering the fraudulent scheme connected by the main conspirators. The fact that the defendants were small businessmen who were active in local politics could not be used to infer any special business savvy. Furthermore, the fact that the transaction was not "standard operating procedure" was likewise insufficient to establish the requisite intent on the part of the defendants. Although the court recognized that in some cases a combination of suspicion and deliberate avoidance of further knowledge may establish the requisite intent, it noted that such an inference requires a "fairly large amount of knowledge" to permit

a jury to find the requisite intent. The Court further stated:

> To permit an inference of knowledge from just a little suspicion is to relieve the prosecution of its burden of showing every element of the case beyond a reasonable doubt.

Bailey at 1275, quoting from United States v. Ramsey, 785 F.2d 184 (7th Cir. 1986), cert. den. 476 U.S. 1186, 106 S.Ct. 2924, 91 L.Ed.2d 552 (1986). Absent a showing of expertise in a particular area and a sufficient basis upon which to impute said knowledge, evidence that a situation is merely suspicious is insufficient to establish the requisite guilt under the mail fraud statutes. See, also, United States v. Piepgrass, 425 F.2d 194 (9th Cir. 1970) ("mere 'involvement in an unsavory, high-pressure fly-by-night scheme' is not sufficient to establish 'knowing participation in a scheme to defraud.'") The Bailey case is particularly applicable to the facts at hand. Like the two Bailey defendants, Petitioner had no particular knowledge or expertise as to the operations of a chiropractic clinic. No evidence was presented to establish that the clinic had insufficient technicians, improper x-ray devices or the like; that Petitioner was knowledgeable as to any asserted deficiencies in the operating

standard of a chiropractic clinic; or that any such knowledge would put Petitioner on notice that the clinic was operating a scheme to defraud insurance companies. No evidence whatsoever was adduced that Petitioner had any knowledge that other patients were being paid by Dixon for fictitious office visits. Furthermore, the evidence failed to establish that Petitioner had any knowledge as to the purpose and meaning of the EOB forms. This, in light of the fact that the Government never established that any EOB forms were ever received by Petitioner other than the one which Petitioner's wife testified to having received, clearly demonstrates that the Government failed to meet its burden in offering sufficient evidence to establish the guilt of Petitioner beyond a reasonable doubt. This result is not changed by the receipt of any profit (like the $5,000 in Bailey) by Petitioner.

The insufficiency of the evidence with regard to the intent of Petitioner is further compounded by the fact that the Government made no effort whatsoever to link the various asserted inadequacies or unusual practices at the clinic with the fraudulent scheme perpetrated by the Dixons. There is no nexus whatsoever

between the inappropriate operation of an x-ray machine and a scam designed to bilk monies from insurance companies. Indeed, common sense would seem to dictate that if Petitioner were knowledgeable about a dangerous or inappropriate x-ray technique, and was acting in concert with Dr. Dixon and not in fact being treated, he would have no reason to undergo, and every reason to avoid, such treatment. Likewise, the keeping of a dog at the clinic premises or the carrying of a gun by a chiropractic physician do not of themselves or in conjunction with other circumstances establish that a particular physician is involved in a fraudulent scheme using the mails. The evidence presented below was, therefore, patently insufficient to establish guilt on the part of Petitioner, and had no probative character whatsoever.

II. WHETHER THE CONVICTION OF A DEFENDANT SHOULD BE WITHHELD WHERE THE GOVERNMENT'S CONDUCT IS FRAGRANTLY IMPROPER AND INFLAMMATORY AND RESULTS IN EFFECTIVELY DENYING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL?

In order to overcome the insufficiency of the evidence, the prosecutor in this case resorted to improper and inflammatory

argument to the jury. In all probability, had the Government not resorted to such argument along with blatant misstatements of the law and the facts, the jury would have recognized the total lack of evidence, especially with regard to the intent of Petitioner, and acquitted Petitioner of all charges. Where there is a reasonable probability that, but for the prosecutor's improper and inflammatory remarks, the outcome of the proceedings would have been different, the verdict of the jury must be reversed. Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991), cert. den. _ U.S. _, 112 S.Ct. 957, 117 L.Ed.2d 124 (1992).

The flagrantly improper and inflammatory statements of the Government constituted a naked appeal to passion and prejudice which cannot be countenanced. This theme was emphasized repeatedly in closing arguments. The prosecutor played upon juror concerns regarding employment, asking the jury, "How many people in the Waycross area stand in line for the railroad jobs?" (R. 3-478); insurance costs, commenting:

> And, ladies and gentlemen, the insurance company, in case there is any doubt in your mind, is not the victim in this case. Oh, they had to pay the money but you know what happens next year.

> When an insurance company pays that money, the rates go up. The victim is not the insurance company. They're going to get their money back. And they're going to get it back from all the honest people who really need health insurance in this country and can't get it because they can't afford it even though both husband and wife are working. Those are the victims. (emphasis added)
>
> * * *
>
> And the people here who are doing everything they can to dry those rates up while lining their own pockets are responsible for it. (emphasis added);

and health care availability:

> And there is a human cost here. Imagine, if you will, the treatment denied and the treatment delayed that result from this whole scam. Somebody says, "I've got a problem, I need a chiropractor" and Al Graves and Jerry Orange are standing there ready to send that person where? To John R. Dixon. Treatment denied and treatment delayed. Why? Because they get a hundred dollars if they do it. For a hundred dollars they sell out a friend.

None of these statements were supported by any evidence in the record and were clearly a desperate attempt to bolster a weak and insufficient case against Petitioner.

It is totally improper for a prosecutor to urge the jury to convict a defendant in order to assist in the solving of a pressing social problem. United States v. Monaghan, 741 F.2d 1434 (D.C. Cir. 1984), cert. den. 420 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985). The danger of permitting a prosecutor to use such argument is that a defendant is far more likely to be convicted for reasons totally unrelated to the guilt or innocence of that particular defendant.

As there was no direct evidence of Petitioner's intent to participate in and encourage the fraudulent scheme by the Dixon Clinic, it can clearly be seen that the argument of the prosecution that the Defendant was un-American, that his actions affected substantial national issues, deprived Waycross residents of affordable medical care and/or jobs with the railroad, and caused legitimately ill people to be deprived of medical care, all played a key role in Petitioner's conviction and the blindness of the jury to the lack of evidence. The prosecutor repeatedly made accusatory references to "they" and "the patients" that had nothing to do with any actions or knowledge attributable to Petitioner

which accusations were, in fact, clearly rebutted as to Petitioner's conduct and knowledge by the Government's own evidence.[2] The prosecutor further attempted to confuse the acts of Petitioner with his co-Defendant, Jerry Orange. For example, Mr. Orange admitted to receiving a verification letter from Travelers' Insurance Company with regard to the claims that were being submitted. This verification form was later signed and returned to Travelers' Insurance Company with no indication of misreporting. Petitioner, however, was never sent a verification letter, never received a verification letter and never executed any verification letter with regard to the charges being submitted by the Dixon Clinic. Nonetheless, the prosecutor, in closing argument, stated that with regard to the verification letters, "they sent it back

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[2]Examples of such statements by the Government are:

"They were not coming to a chiropractor."
"They were going there for the money, not for the treatment..."
"The patients knew that for every check they got from Dixon there was an EOB mailed."
"And everybody knew that that was what was going to happen."
"The patients in this case sold Dr. Dixon access to their policies, the best way I can put it. They sold him access to their policies knowing he would file false claims and they would get a cut of the take."
"...because they weren't going there for a doctor."

through the mail".

This entire prosecution was structured around the idea that the prosecutor could round up a list of practices or events that were experienced or witnessed in varying degrees or not at all by various patients and other observers and project the aggregate list upon a particular defendant. The entire prosecution assumes a nexus between the aggregate observations of all involved and the formation of criminal intent. The Government is essentially imposing a burden on any patient of any medical care provider to question the competency and obtain the expertise regarding medical practice such that it can determine if any criminal or fraudulent enterprise is being conducted within the confines of that medical practice. The entire theory of the Government's case relied upon the existence of various circumstances relating to the operations of the clinic, the assumption that such circumstances had a logical nexus to the existence of a mail fraud scheme; the supposition that Petitioner was aware of both the circumstances and their perceived inconsistency with legitimate chiropractic technique; and the naked assertion of knowledge and improper

motive on the part of Petitioner, of which not a hint was presented in the evidence. The prosecution failed to establish that Petitioner had any knowledge whatsoever of the fact, nature or extent of the scheme charged. This evidentiary void underscores both the inflammatory nature of the prosecution's presentation to the jury and the prosecution's perceived need to foster jury sentiment willing to convict upon evidence which impartial and dispassionate deliberation would reject as plainly insufficient.

Further, Government misconduct is illustrated by the fact that, on the eve of trial, FBI Agent Frank Bennett with full knowledge of the United States Attorney's office initiated contact with witnesses who had been subpoenaed by Petitioner. Agent Bennett admitted before the Court in a post-trial proceeding that he spoke to a Linda Hall, C. K. Sires and Frances Woodard at the CSX Railroad yard where the individuals were employed. These individuals were former patients of the Dixon Clinic and acquaintances of Petitioner. Petitioner had expected that these witnesses would legitimately aid him in presenting his defense to the jury. Agent Bennett admitted that his purpose in contacting

these individuals was to find out what their testimony might be. In fact, Mr. Sires testified at that hearing that Agent Bennett told him "Son, I'm gonna tell you...you're in big trouble." The transcript of the hearing before the court on June 12, 1992, demonstrates the overall intimidation experienced by at least two of Petitioner's potential witnesses which resulted in the inability of the Defendant to use their testimony. The trial court itself acknowledged that many people in the community were frightened because of their patronage at the Dixon Clinic and fearful that they may be the next charged. Nonetheless, the trial court refused to acknowledge that such intimidation on the part of the Government warranted a new trial for Petitioner.

Another major concern is the testimony of the Government's chief witness, Janell Hornsby, with regard to any agreements or plea arrangements which she had with the Government. In the proceedings below, Ms. Hornsby testified as follows:

> QUESTION: (By Mr. Lane) Would it be fair to say that in exchange for your plea of guilty in this case and your commitment to testify for the Government in this case that you received a plea agreement?

ANSWER: (By Ms. Hornsby) No Sir.

QUESTION: You did not receive a plea agreement?

ANSWER: I entered the guilty plea but -- repeat that again. I mean I wasn't promised anything to testify. No, Sir.

QUESTION: Did you sign a written plea agreement?

ANSWER: Yes sir I entered a guilty plea but I wasn't promised anything.

QUESTION: Okay. And you entered a plea - - -

ANSWER: Yes, sir.

QUESTION: - - - of guilty?

ANSWER: Yes, sir.

QUESTION: Did you ever reach any agreement with the Government to testify for the Government in this case?

ANSWER: I just testified. It wasn't so I could enter a guilty plea.

* * *

QUESTION: Alright. And the reason you weren't indicted is because of arrangements or discussions with the Government prior to the return of that indictment; is that correct?

ANSWER: I never had any arrangements or discussions with the Government. I had an attorney. But I myself didn't have any discussions or agreements or arrangements with them.

Subsequent redirect examination further bolstered this false testimony:

> QUESTION: (By AUSA Kramer) So basically you had said everything you had to say long before not only you never had a deal but you never had an attorney; is that right?
>
> ANSWER: (By Hornsby) That's right.
>
> QUESTION: Did you know what sentence you were going to get?
>
> ANSWER: No, sir.
>
> QUESTION: Did the government?
>
> ANSWER: No, sir. Not to my knowledge. You all didn't.
>
> QUESTION: Who imposes the sentences?
>
> ANSWER: Judge Edenfield.
>
> QUESTION: And in fairness to the Judge, he is limited by the guidelines and the laws; isn't he?
>
> ANSWER: Yes, sir. I hope.

Subsequently, it was revealed that the Government did, in fact, have a plea agreement with Janell Hornsby. After the last defense witness was excused by Petitioner's counsel, the prosecutor revealed and stipulated that Janell Hornsby had, in fact, entered

into a plea agreement wherein the Government assured her that if she cooperated with the Government by promising her testimony in the prosecutions related to the Dixon Clinic, the court sentencing her following her plea of guilty would be made aware of such cooperation and it could assist her in obtaining a lighter sentence. In fact, even the trial court was aware of the existence of an agreement between this witness and the Government because the trial court had actually imposed sentence on her. Still, this was not brought to the attention of the jury until far too late for Petitioner's counsel to prepare for or conduct an effective cross-examination on that issue. Adding insult to injury and compounding the injury, the prosecutor in his rebuttal argument to the jury misleadingly asserted the Government had no deal with any witness in the case.

Due process requires that the Government provide a complete and timely disclosure of any arrangements made with any witnesses who are involved in the criminal enterprise. Additionally, in order for such disclosure to be meaningful, it must be made in time for the defense to have adequate opportunity

for cross-examination regarding the arrangement. United States v. Wilson , 904 F.2d 656 (11th Cir. 1990), cert. den. __ U.S. _ _, 112 S.Ct. 250, 116 L.Ed.2d 205 (1991). In Wilson, it was held that in order to ensure due process, the government must not deliberately use perjured testimony and, where testimony is used pursuant to a plea agreement, the defendant is entitled to a special cautionary instruction on the credibility of the government witness. None of these procedural safeguards were in place in the case below. First of all, the Government knowingly permitted Ms. Hornsby to testify that there was no plea agreement and that she had no discussions or negotiations about this. It is no excuse that discussions were held through her attorney or that the arrangements were made through her attorney. See, e.g.; Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979); Haber v. Wainwright, 756 F.2d 1520 (Cir. 1985). Additionally, the prejudice to Petitioner by the concealment of the plea agreement, the solicitation of false or misleading testimony concerning such agreement by the prosecutor, and untimely disclosure long after the Government had rested its case and after the defense had

excused its last witness, was not and could not have been cured or ameliorated by the belated and sterile stipulation that she had, in fact, participated in a plea agreement and had received consideration for her cooperation. Despite this stipulation, Petitioner was denied the opportunity for effective cross-examination of this witness. The denial of a defendant of the opportunity to effectively cross-examine any witness is a denial of due process which warrants a reversal of the conviction. United States v. Bagley, 473 U.S. 667, 106 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Furthermore, the Government's action in reaffirming the testimony on redirect and misstating the evidence in rebuttal further compounded the error. The Government has a duty to correct false testimony when it knows such testimony to be false and, additionally, not to compound the damage inherent in the presentation of the testimony by affirming that testimony by its own remarks. Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977); Dubose v. Lefevre, 619 F.2d 973 (2nd Cir. 1980).

The standard to be used in determining whether or not the perjured testimony and the affirmations of said testimony by the Government are material to protecting the due process rights of the Defendant is whether the false or misleading testimony could, in any reasonable likelihood, have affected the judgment of the jury. Brown v. Wainwright. Here, the testimony of Janell Hornsby was critical to the Government's case. Ms. Hornsby had the most comprehensive knowledge with regard to the operations of the Dixon Clinic of any of the Government's witnesses. The only other insider who testified on behalf of the Government was Kristie Mullis who, admittedly, worked at the clinic for a very short period of time and could not accurately identify Petitioner. Janell Hornsby also was the only one who was willing to testify that Petitioner did not receive treatments at the clinic and came to the clinic only on days when he thought that checks would be available for him.[3] This witness' testimony was heavily relied

[3]It is important to observe that, upon cross-examination, Janell Hornsby recanted her statement on direct that Graves did not receive treatment and admitted that "it's just you didn't know who got a treatment and who didn't." Ms. Hornsby's eagerness to please the prosecution was obviously a direct result of the lenient sentence (three months incarceration and five years probation) she received in spite of the fact that she was a major conspirator in the fraudulent scheme.

upon in the prosecution's closing arguments. It was her testimony that provided the argument that the unprofessional and unorthodox atmosphere at the clinic should have placed Petitioner on notice that the clinic was operating a scheme to defraud. Thus, Ms. Hornsby testified as to the limited hours kept by Dr. Dixon, the fact that there were no appointments made and services were provided on a walk-in basis, the number of patients passing through the office, the fact that the doctor did not use a patient's file in his treatments, the fact that the clinic had a tool utilized for range of motion tests which were billed for but never conducted, the fact that a dog was kept at the clinic and in the treatment room, the fact that two x-rays would be taken of a patient and the insurance company would be billed for four, that the people taking x-rays did not have any training, that there was no protection for the people having their x-rays taken, that the x-rays were taken from a shower stall, and other aspects of the operations of the clinic. Thus, there can be no question that this particular witness

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Lastly, any impact of the stipulation on the issue of her credibility was lost completely when the Government chose to argue on rebuttal that Ms. Hornsby and the other billing clerks testified "without a deal."

was material to the Government's case and to the end result of obtaining a conviction against Petitioner.[4]

The fact that the Government allowed Janell Hornsby to perjure herself with regard to an agreement between herself and the Government, along with the subsequent actions of the Government affirming that testimony in front of the jury before later admitting the falsity of this testimony, were material factors resulting in the conviction of Petitioner. Because of this clear violation of the due process rights of Petitioner, Petitioner is entitled to a new trial.

The conduct of the trial also failed to safe guard the rights of Petitioner in particular because the Government was attempting to impute the knowledge and motives of hundreds of patients to Petitioner. The complexity of the evidence involved required that the jury pay particular attention and be able to discriminate between the broad brush and the actual evidence pertaining to Petitioner. Unfortunately, the record is clear that this did not occur. For example, in the Government's case in chief, the court

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[4]As noted, such evidence was offered solely for its inflammatory nature.

was required to instruct a juror to stand up in the midst of the Government's direct examination of its own witness. This was apparently required because the juror was in danger of falling asleep. Eventually, the court permitted the juror to sit down with the instruction to "pay attention". Such tactics have been disapproved of by Appellate Courts for use in forcing jurors to pay close attention to the evidence at hand. See, United States v. McClain, 823 F.2d 1457 (11th Cir. 1987). Though concededly this conduct is not as severe as that which occurred in McClain, this is nonetheless troublesome in light of the vary complex evidence before the jury and the government encouragement that the jury not bother to "read each and every one [referring to documents] yourself."[5] In sum, the inflammatory argument, misstatements of evidence and law, along with the conduct of the

[5] Of additional concern is that the jury may have received the wrong impression by some of the unfortunate comments made by the court during the course of the proceedings. When the Appellant's daughter became emotionally upset while testifying, the court expressed its impatience and dismissed her from the stand with instructions to the jury to disregard her testimony. Although the witness was later recalled, the effect of the court's reaction to her could not have been completely erased from the jurors' minds. Additionally, the court, without objection from the government, admonished defense counsel during his direct examination of the Appellant's wife that his question was "the most leading I have ever heard." The court further instructed Appellant's counsel, "do not lead."

trial in general, deprived Petitioner the opportunity to have this matter heard in a fair and impartial setting. These factors all, undoubtedly, had a severe effect upon the jury and resulted in a verdict which is not supported by the evidence.

In United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), this Court stated, "While [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Citing to Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 74 L.Ed.2d 1314 (1935). Once the court concludes that the prosecutor's remarks are improper, the court must next consider the probable effect that the remarks had on the jury's ability to judge the evidence fairly. This Court emphasized that such a determination must be made in the context of the trial as a whole. Though the Court did not find that the prosecutor's comments in Young, warranted a reversal, it did point out factors to be addressed in making such a determination. Among these, whether the prosecutor was reacting to statements of the defense counsel; whether the evidence, irrespective of the prosecutor's comments, was so overwhelming that the comments cannot be said to have

had any effect; whether the remarks, though improper, were supported by the evidence; and whether the jury's verdict shows any indication that the jury was able to separate the prosecutor's comments from the evidence produced at trial.

In this case, the prosecutor's remarks clearly were not in response to any argument made by the defense. Though the Government argued below that the statements made by the prosecutor suggesting that Petitioner was un-American were in response to argument made by the defense, this is completely without merit. Defense counsel simply argued that the advertising fee received by Petitioner from the Dixon was not unlike a rebate received for the purchase of a car or other product. This argument in no way refers to patriotism or citizenship.

Likewise, the prosecution's arguments were not supported by the evidence. There was nothing in the record to suggest that Petitioner's conduct deprived the community of jobs or that it had the effect of driving up insurance rates at all, much less driving up the rates to a point that any person was unable to secure health insurance. There was no evidence that any patients went to the

Dixon Clinic in need of chiropractic care that they did not receive or that anyone suffered from being treated at the Dixon Clinic after being referred there by Petitioner.

Unlike the Young case, overwhelming evidence was not presented which tended to establish Petitioner's guilt. In fact, the record shows no direct evidence at all of an intent on the part of Petitioner to participate in a fraudulent scheme. What little circumstantial evidence was presented was in no way linked to Petitioner. It cannot, therefore, be said that the prosecutor's comments did not effect the outcome of the trial.

Lastly, in Young, this Court specifically noted that the jury had acquitted the defendant there on the most serious charge he faced. The Court ruled that this supported its conclusion that the remarks did not undermine the jury's ability to view the evidence independently and fairly. Here, the contrary occurred. Petitioner was found guilty on every charge of the indictment in which he was named. The jury seemed to make no attempt to analyze the evidence with regard to the specific counts. Like Young, however, the jury's verdict is indicative of the effect of

the prosecutor's remarks on it. Clearly, the effect was to induce their conviction of an otherwise innocent man.

The Eleventh Circuit itself has previously expressed extreme concern regarding these types of arguments made by the prosecution which were apparently ignored in this case. In United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985), the Court stated, "'A prosecutor is...forbidden to make improper suggestions, insinuations and assertions calculated to mislead the jury and may not appeal to the jury's passion or prejudice." 765 F.2d at 1560, citing to United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. den. 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Additionally, the Court warned prosecutors that they must refrain from improper methods calculated to produce a wrongful conviction. A review of the record herein leads to the inevitable conclusion that the prosecutor in this case did just that. Given the backdrop of a weak and insubstantial case, the prosecutor resorted to flagrantly improper arguments and naked appeals to passion and prejudice by tapping into the jury's concerns regarding job security, health insurance and health care,

in order to obtain a conviction against Petitioner at all cost. This should not and cannot be countenanced by this Court.

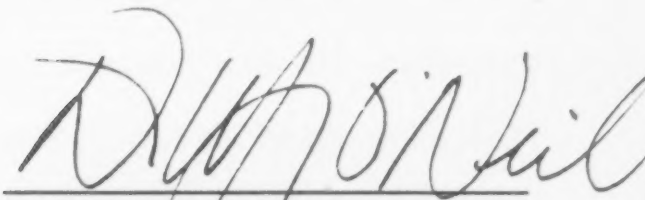
Rodriguez makes another important point that cannot be ignored here. In the course of his closing argument, the prosecutor referred to Petitioner and his co-defendant as "thieves and conmen" who engaged in "lying, cheating and stealing" and equated Petitioner alleged conduct with patronizing a "chop shop" and deliberately ordering stolen cars. (R. 3-769-472, 476, 477) These statements are much stronger and more graphic than the statements made in Rodriguez, referring to the defendants as liars who disrespect the law, which were found to be improper attacks on the character of the defendants. Clearly, the prosecutor's references to a "chop shop" and stolen cars are exactly those type of "improper suggestions, insinuations and assertions calculated to mislead the jury" forbade in Rodriguez. These statements cannot now be ignored.

The government makes much of the fact that counsel for the defense did not object during the course of the prosecutor's arguments. This Court in Young recognized that interruptions of

arguments are to be approached cautiously and held that contemporaneous objections are not necessary when the comments constitute plain error. The Court stated that unprofessional conduct by the prosecutor should be neither permitted nor rewarded. Further, it is the trial judge's responsibility to deal with such misconduct and maintain the decorum of the proceedings. Plain error is defined by the court as "those errors which seriously affect the fairness, integrity or public reputation of the judicial proceedings." Certainly, where the evidence against a defendant is weak, at best, any misconduct by the prosecutor can be said to seriously affect the fairness of the proceedings. Where the prosecutor repeatedly and continually makes argument that has no relevance to the proceeding other than to improperly effect the jury, the court must afford the defendant a new trial. This Court cannot countenance the repeated failure of the prosecutor to conduct himself in a professional manner and to refrain from striking "foul blows" in order to obtain a conviction at any cost.

Respectfully, Petitioner requests that this Court review the proceeding below and issue a writ of certiorari requiring a reversal of his conviction below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by United States Mail to the Solicitor General, Department of Justice, Washington, D.C. 30530, and Frederick W. Kramer III, Esquire, Assistant United States Attorney, Post Office Box 8999, Savannah, Georgia 31412, this 14th day of July, 1994.

DAWN WEIGER O'NEILL, Esquire

APPENDIX

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 92-8598 & 92-8805

D. C. Docket No. CR591-9-23

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALONZO GRAVES, JR.,

Defendant-Appellant.

Appeals from the United States District
Court for the Southern District of Georgia

(February 10, 1994)

Before: BIRCH, Circuit Judge, RONEY* and CLARK, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

ENTERED FOR THE COURT:

/S/

UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 92-8598 & 92-8805

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALONZO GRAVES, JR.,

Defendant-Appellant.

On Appeal from the United States District
Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, Circuit Judge, RONEY* and CLARK, Senior Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
WAYCROSS OR BRUNSWICK DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR 591-009 (23)
	)	
ALONZO GRAVES	)	

ORDER

On April 1, 1992, a jury found Alonzo Graves guilty of seven counts of mail fraud. Graves has moved the Court, pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure, to enter a judgment of acquittal notwithstanding the jury's verdict or to grant a new trial. As explained below, the Court **DENIES** Graves' motion for judgment of acquittal, and **DENIES** the motion for new trial to the extent that it concerns the weight of the evidence and the Court's jury instructions. The Court will hold an evidentiary hearing on Graves' contention that government agents acted improperly during interviews with potential defense witnesses before trial.

DISCUSSION

Graves' primary argument in this motions for judgment of acquittal and for new trial is that the government failed to satisfy its burden of proof at trial concerning Graves' mental state to commit the crime. Accordingly, Graves argues that he is entitled to a judgment of acquittal because the jury's verdict is based on insufficient evidence. In the alternative, he argues that he is entitled to a new trial because the jury verdict is against the weight of the evidence.

Graves also argues that he is entitled to a new trial because of trial error and prosecutorial misconduct. These actions, Graves asserts, denied him a fair trial. The Court will address these issues seriatim.

I. Motions Based on Sufficiency and Weight of Evidence

To decide a Rule 29 motion for judgment of acquittal, a court must take all evidence presented at trial and assess it in the light most favorable to the government, giving the government the benefit of all inferences reasonably to be drawn in its favor from that evidence. Tibbs v. Florida, 457 U.S. 31, 38 n.11 (1982);

United States v. Berki, 936 F.2d 529 (11th Cir. 1991), cert. denied, 112 S.Ct. 1677 (1992); United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir. 1985). "The verdict may be based in whole or in part on circumstantial evidence." Tibbs, 457 U.S. at 38 n.11. The evidence need not exclude every reasonable hypothesis other than guilt, as long as the jury could find that the evidence established guilt beyond a reasonable doubt. Id.; United States v. Sanchez, 722 F.2d 1501, 1505 (11th Cir.), cert. den., 467 U.S. 1208 (1984). Moreover, the inferences that the jury draws from the evidence need not be the only possible inferences. The jury is free to choose among reasonable constructions of the evidence. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356 (1983). If the evidence is sufficient for a rational jury to find the defendant guilty of every element of the offense beyond a reasonable doubt, then the court must deny the defendant's motion for judgment of acquittal. United States v. Wooten, 503 F.2d 65, 66 (4th Cir. 1974).

When a defendant moves, pursuant to Rule 33, for a new trial on the ground that the verdict is contrary to the weight of the

evidence, a court "need not construe the evidence in the light most favorable to the verdict; it may weigh the evidence and in doing evaluate for itself the credibility of the witnesses." Tibbs, 457 U.S. at 38 n.11; see United States v. Martinez, 763 F.2d at 1312. If the court decides that, despite the technical sufficiency of the evidence to sustain the verdict, the evidence weights so heavily against the guilty verdict that a serious miscarriage of justice may have occurred, then the court should grant a new trial. Tibbs, 457 U.S. at 38.

During Graves' trial, the government established that Dr. Dixon's office billed Graves' insurance carrier for hundreds of visits, treatments, and services supposedly rendered to Graves and his wife. Graves and his wife actually visited Dr. Dixon's office very few times. In fact, Mrs. Graves was employed as a school bus driver in Tampa, Florida on most days when Dr. Dixon's office billed her for services. When Graves' insurance carrier paid benefits to Dr. Dixon, Dr. Dixon's office paid one third of the benefits to Graves, calling this money an "advertising fee."

With this evidence in mind, Graves concedes that the government proved that Dr. Dixon and his staff carried out a

scheme to defraud insurance companies and used him and his benefits to further that scheme. Graves contends, however, that the government failed to prove that he knowingly participated in the scheme. He contends that the government failed to establish "the guilty knowledge and knowing association of the Defendant with the billing scheme of the Doctor Dixon and his staff such that a rational trier of fact could conclude the burden of proof has been met." (Def.'s Mot. New Tr. at 1.) Accordingly, Graves asks the Court to enter a judgment of acquittal.

Because courts and juries seldom have any direct proof of a defendant's intent or knowledge, the law allows the trier of fact to rely on circumstantial evidence to determine a defendant's state of mind. Both direct and circumstantial evidence proved that Graves had the requisite intent to commit mail fraud.

Graves visited Dr. Dixon's office and must have noticed his bizarre surroundings. Graves insists that this fact provides nothing because "All doctors are strange. Chiropractors are stranger than most. . . . Moreover, the only strange behavior of the Doctor shown in the presence of the Defendant was the wearing of a gun on one occasion of examination." (Br. Mot.

New Tr. at 2.) The jury, however, was free to conclude from this evidence that Graves was on notice that something odd was going on in Dr. Dixon's office. Moreover, the government introduced evidence that Graves was present in the treatment room when Dr. Dixon advised one of Graves' friends what to do about his insurance company's suspicions that the friend had not received all of the treatments for which he had been billed. Dr. Dixon told Graves' friend to tell the nosy insurance company that he had received treatments at Dixon's farm although the friend had received no treatments at all. This friend later told Graves that he would not return to Dr. Dixon's office because something was not right about the entire arrangement with Dr. Dixon's office.

Despite these warnings, Graves continued to go to Dr. Dixon's office to pick up his checks. He picked up checks for on his behalf, and on behalf of his wife, who was living in Florida. On one occasion, he had a dispute with Lela Dixon concerning his billing. Rather than complain of overbilling, however, he complained that the office had not updated his file recently, and consequently his insurance company was not billed enough. All of this evidence showed that Graves knowingly participated in the

scheme to defraud. Accordingly, Graves' motions for judgment of acquittal or for new trial based on the sufficiency or weight of the evidence are **DENIED.**

II. **Motions Based on Trial Error**

Graves moves for new trial not only based on the weight of evidence, but also because he contends that the Court's refusal to give a requested jury instruction denied him a fair trial. To succeed in a motion for new trial based on trial error, a defendant must show that a new trial would lead to a different result, United States v. Champion, 813 F.2d 1154, 1171 (11th Cir. 1987), or that a substantial prejudicial error has caused a "miscarriage of justice." Martinez, 763 F.2d at 1313. The Eleventh Circuit has made it clear that courts should grant motions for new trial based on trial error "sparingly and with caution, doing so only in those really 'exceptional cases.'" Id. A refusal to give a requested jury instruction is reversible error only if the requested instruction was correct, was not otherwise substantially covered by the court's charge, and dealt with an issue so important that failure to give the instruction seriously impaired the defendant's ability to conduct a

defense. United States v. Camejo, 929 F.2d 610, 614 (11th Cir.), cert. denied, 112 S.Ct. 228 (1991).

Graves contends that he is entitled to a new trial because the Court refused to give his requested charge number 13, which would have informed the jury that they could not find the Defendant guilty solely because he had accepted money. Although the Court did not give this instruction, the Court gave clear instructions on the essential elements of the offense, including intent. In addition, the Court instructed the jury that "good faith" constituted a defense to the charge. This additional charge emphasized the importance of knowing participation as an element of the offense. Accordingly, if the jury followed the Court's clear instructions, it could not have returned a guilty verdict based solely on evidence that Graves accepted money from Dr. Dixon's office. The motion for new trial on this basis is **DENIED.**

III. **Government Conduct**

Graves' final argument in support of his motion for new trial concerns the actions of some government agents prior to trial. Before trial, government agents interviewed some potential defense

witnesses. As Graves concedes, this fact indicates nothing sinister, but only normal pretrial preparation. Graves asserts however, that the government agents intimated to these potential witnesses that if they testified for the defense then the government would prosecute them for their own involvement. As a result, Graves contends that B. K. James, Gloria Clayton, and C. K. Sires were reluctant to testify at all. Frances Woodard, Graves argues, "molded her testimony to what she was instructed the facts were even though she genuinely believed otherwise." (Br. Mot. New Trial at 7.)

The government concedes that agents interviewed these witnesses, and others, prior to trial. The government denies, however, that the agents did anything that would deny the Defendant a fair trial. To resolve this issue, the Court will hold an evidentiary hearing. The hearing will be held in Courtroom 1 in Savannah, Georgia, on June 12, 1992, at 10:00 a.m..

CONCLUSION

As explained above, the Court **DENIES** Graves' motion for judgment of acquittal or new trial to the extent that the motion

concerns the sufficiency and weight of the evidence. The government presented ample evidence of all elements of the offense, including Graves' state of mind. The Court also **DENIES** Graves' motions to the extent that they seek relief because the Court refused to instruct the jury on Graves' Request to Charge No. 13. The Court properly instructed the jury on the elements of the offense and on the defense of good faith. The Court will not rule on Graves' motion for new trial based on alleged government misconduct at this time. Instead, the Court will hold an evidentiary hearing, as mentioned above, to resolve this issue.

SO ORDERED this 1st day of June, 1992.

/S/

B. AVANT EDENFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA

v. **VERDICT**

Case Number: CR591-009-23

ALONZO GRAVES, JR.

WE, THE JURY, FIND: the defendant, ALONZO GRAVES, JR.

Guilty as to Count 181

Guilty as to Count 182

Guilty as to Count 183

Guilty as to Count 184

Guilty as to Count 185

Guilty as to Count 186

Guilty as to Count 187

SO SAY WE ALL.

/S/

FOREPERSON'S SIGNATURE

1 Apr 92

DATE